Supreme Court, U.S.
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In the

Supreme Court of the United States

JOHN HALL,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition for a Writ of Certiorari to the

United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit used the proper standard of review in reaching its decision on Petitioner's appeal from the final Order of the United States District Court for the Eastern District of Oklahoma ("Order," see Appendix B), filed June 11, 2003, granting Respondent's Motion to Dismiss on all of Petitioner's claims.

2. Whether--in light of a split in the circuits--an instance of attorney misconduct should permit the tolling of a statute of limitations for a filing deadline in a civil rights case, especially if that misconduct includes the direct misrepresentation to a client of the nature of the deadline.

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The Color-Blind Constitution, Andrew Kull (1992) 6

Statutory History of the United States: Civil Rights, Part 2, Bernard Schwartz, editor 6

Employment Discrimination Law, 3rd Edition, Vol. I, Paul W. Cave, Jr., editor-in-chief, et al. (1996) 7

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Understanding the Americans with Disabilities Act, an Overview for Lawyers, William D. Goren (2000) 7, 8

Disability Law Deskbook, the Americans with Disabilities Act in the Workplace, Michael Faillace (June, 2003) 8

Equal Opportunity Law and the Construction of Internal Labor Markets, Frank Dobbin, et al., American Journal of Sociology, Vol. 99 (1993), in Foundations of Employment Discrimination Law, 2nd edition, John J. Donohue, editor (2003) 9

The Changing Nature of Employment Discrimination Litigation, John J. Donohue and Peter Siegleman, Stanford Law Review, Vol. 43 (1991), in Foundations of Employment Discrimination Law 12

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Appendix B Order of the District Court for the Eastern District of Oklahoma, filed June 11, 2003

OPINION BELOW

The Order and Judgement ("Judgement") of the Tenth Circuit in the instant case, No. 03-7077, from which this appeal is taken, was filed on May 25, 2004. See Appendix A.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1254.

STATUTORY PROVISIONS

This case has been brought under the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12101-12213. The pertinent section of that Act is 12117(a):

> The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

The timeframe for filing a complaint based upon the ADA is set forth in 2000e-5(f)(1), which reads in relevant part:

> If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not

filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT OF THE CASE

On September 20, 1999, Petitioner ("Petitioner" or "Mr. Hall") was terminated from his employment with Respondent United Parcel Service, Inc. ("UPS" or "Respondent") On June 23, 2000, Mr. Hall timely filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). After receiving a notice of his right to sue, Mr. Hall timely filed a lawsuit in June of 2001.

Mr. Hall's then attorney, John Mack Butler ("Mr. Butler"), did not prosecute Mr. Hall's lawsuit in a manner that comported with either the Oklahoma Rules of Professional Conduct or the Federal Rules of Civil Procedure, in fact not even bothering to perform the minimal investigation necessary to respond to a motion for summary judgement.

In the meantime, Mr. Butler was charging Mr. Hall $9,000.00 for his "work."

During the entire period of his representation of Mr. Hall, Mr. Butler was contacted by Mr. Hall on at least a weekly, but often more frequent, basis. Mr. Hall would often go directly to Mr. Butler's office in an attempt to speak to him about the status of Mr. Hall's case. On the few occasions that Mr. Hall was actually able to speak directly to Mr. Butler, Mr. Butler gave him reassurances that everything possible was being done to forward his interests.

Mr. Butler dismissed Mr. Hall's lawsuit without prejudice on January 23, 2002.

In his efforts to quiet Mr. Hall's objections, Mr. Butler explained to him that he had dismissed the lawsuit without prejudice precisely so that Mr. Hall would have another and better opportunity to prosecute his case at a later date. Mr. Butler directly misrepresented to Mr. Hall that he could at any time within a year from the date of dismissal refile the lawsuit in either federal or state court. Mr. Hall finally acquiesced.

Mr. Butler was purportedly pursuing an action in another forum, that of the worker's compensation court, for Mr. Hall. When it became evident that Mr. Butler was not properly pursuing Mr. Hall's claims in that forum, Mr. Hall began to see that Mr. Butler's efforts in his federal cause of action may be equally dilatory. He finally had to discharge Mr. Butler in November of 2002.

Upon his discharge, Mr. Butler presented Mr. Hall with another bill of $18,000.00 for his "services."

Mr. Hall diligently sought counsel both for his worker's compensation and federal claims. Having procured a worker's comp attorney, he turned his full attention to the instant case, but was unable to procure other counsel in the short time remaining before the deadline given him by Mr. Butler. He therefore decided to refile his lawsuit himself as best he could before that deadline.

Mr. Hall refiled his lawsuit on January 21, 2003, before the date his attorney had misrepresented to him was his new deadline. The Court of Appeals for the Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 over Mr. Hall's appeal from the Order of the District Court for the Eastern District of Oklahoma, filed June 11, 2003, granting Defendant's Motion to Dismiss. Jurisdiction in the Eastern District of Oklahoma arose under 28 U.S.C. sections 1331 and 1343

ARGUMENT AND AUTHORITIES

I. Review by this Court is Warranted Because the Tenth Circuit Made Use of an Improper Standard of Review in Deciding the Merits of Petitioner's Appeal

Under the proper standard of review for an appeal taken from a district court to a circuit court of appeals, the court of appeals reviews the appellant's contentions de novo, applying the same standards as the district court in the first instance. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1175 (10th Cir. 1999).

In considering a motion to dismiss, a federal judge must

accept as true all the factual allegations of the complaint, construe them in a light most favorable to the Plaintiff, and resolve all reasonable inferences in Plaintiff's favor. *Seamons v. Snow*, 84 F.3d 1226, 1231 (10th Cir. 1996). A complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that a plaintiff can prove no set of facts which entitle him to relief. *Conley v. Gibson*, 355 U.S.41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

In the instant case, Petitioner has alleged serious misconduct on the part of his counsel, including active deception. The Tenth Circuit has recast that allegation as "[m]ere negligence" and "garden variety…excusable neglect," *citing Steed v. Head*, 219 F.3d 1298, 1300 (11th Cir. 2000); *Irwin v. Dept. of Veteran's Affairs*, 498 U.S. 89, 96 (1990), declaring the attorney's misconduct to be merely "erroneous advice." Order 2, pp. 3, 5.

It is clear that the Tenth Circuit did not accept as true all of Petitioner's factual allegations, construe them in a light most favorable to Petitioner, and resolve all reasonable inferences in his favor.

The Tenth Circuit recognized Petitioner's allegation that "he was actively misled by his counsel," but disallowed that allegation because he "received a right-to-sue letter from the EEOC" which "contained, in bold print, the warning that he had to file any lawsuit within ninety days." Judgement, pp. 4-5. But the issue before the Court was not whether he had access to the right-to-sue letter, but whether its legal implications were clear to him.

First, Petitioner **did** file within the statutory period. **The question is rather whether he had a right--if his lawsuit was dismissed without prejudice--to refile**. If, as Petitioner alleges, his attorney lied to him about the true import of that right-to-sue letter, he was actively misled into believing that he could refile because his case had been dismissed "without prejudice."

It is clear that the Tenth Circuit did not accept as true all of Petitioner's factual allegations, construe them in a light most favorable to Petitioner, and resolve all reasonable inferences in his favor.

Moreover, the Tenth Circuit argues that a claimant "must **initiate** litigation on an ADA claim within ninety days from the date he receives a 'right-to-sue' letter from the EEOC." Judgement, p.3. But it goes on to assert that Petitioner "agrees that he did not comply with these requirements." *Id* (emphasis added).

This completely mischaracterizes Petitioner's position. He did "initiate" his litigation within ninety days. He simply admits that "under existing law" his **re**filing was untimely. Petitioner's Reply Brief to the Tenth Circuit, p. 3.

It is clear that the Tenth Circuit did not accept as true all of Petitioner's factual allegations, construe them in a light most favorable to Petitioner, and resolve all reasonable inferences in his favor.

Finally, the Tenth Circuit relied in part for its decision on Petitioner's supposed allegation "that he failed to file his second ADA action **promptly** because he was actively misled." Judgement, p. 4 (emphasis added). But Petitioner does not argue that filing "promptly" would have ameliorated his position since it was his need to refile at all that is at stake. Even an immediate refiling would not have turned the legal position into which he was forced into his favor.

It is clear that the Tenth Circuit did not accept as true all of Petitioner's factual allegations, construe them in a light most favorable to Petitioner, and resolve all reasonable inferences in his favor.

The Tenth Circuit's complete disregard of the proper standard of review in the instant case provides sufficient grounds for the instant Court to review the issue at bar.

III. Review by this Court is Warranted Because both Justice and Important Public Policy Goals are Served in a Civil Rights Case When a Filing Deadline is Tolled Because it has Been Missed Through Attorney Misconduct

A. The Elimination of Discriminatory Employment Practices is an Urgent Public Policy

1. America's Anti-Discrimination Legislation was Born of Crisis

The Civil Rights Act of 1964 "was forged in an atmosphere of urgency.... During the spring of 1963, the world watched as demonstrators were beaten, attacked by police dogs, sprayed with high pressure water hoses, and then arrested and jailed." EEOC website, www.eeoc.gov/35th/pre-1965.

On June 11, 1963, President John F. Kennedy went on

television to address the nation: "We are confronted primarily with a moral issue. It is as old as the scriptures and it is as clear as the American Constitution....The events of Birmingham and elsewhere have so increased the cries for equality that no city or state or legislative body can prudently ignore them. We face, therefore, a moral crisis as a country and as a people." *Id.*

In August of that year, a quarter million Americans of all races marched to the Lincoln Memorial in Washington, DC, to hear Dr. Martin Luther King's "I Have a Dream" speech. *Id.* Pressure on Congress increased so dramatically that "it became too great to be withstood by the usual parliamentary maneuverings and the Senate filibuster." *Title VII: Legislative History,* Francis J. Vaas, VII Boston College Industrial and Commercial Law Review, 431 (1966). One year later, on July 2, 1964, the 88th Congress delivered the Civil Rights Act of 1964 to President Lyndon Baines Johnson after nearly 100 days of deliberation, a deliberation so extensive that it can be called a "national convention on race." *The Color-Blind Constitution*, Andrew Kull, 183 (1992).

Of the explosion of civil rights bills introduced in the House of Representatives, the "more comprehensive...were referred to the House Committee on the Judiciary." The appropriate Subcommittee "formally considered a total of one hundred seventy-two bills." *Title VII: Legislative History.*

The Senate debated the bill for 83 days. *The Color-Blind Constitution* at 183. The struggle in that body "was titanic and protracted." *Title VII: Legislative History.* In the process, the Senate invoked cloture on a civil rights bill for the first time, thus ending the longest filibuster in Senate history. Senators spoke more than 10 million words and filled up 7000 pages of the Congressional Record. *Statutory History of the United States: Civil Rights, Part 2,* Bernard Schwartz (ed.), 1089. The Act was passed by a vote of 73 to 27 in the Senate (every Senator voting) and in the House by a vote of 289 to 126. *110 Cong. Rec.* 14511 (June 19, 1964) and 15897 (July 2, 1964).

Several years later, "[i]n 1971, Congress conducted public hearings on proposed amendments to Title VII and concluded that...'employment discrimination is even more pervasive and tenacious than...Congress had assumed...[when] it passed the 1964 Act." Based on extensive findings, Congress passed the Equal Employment Opportunity Act of 1972, giving the EEOC litigation

authority for the first time and greatly expanding its jurisdiction. EEOC website, www.eeoc.gov/35th/1970's/ index.html.

Another twenty years were to pass before the Civil Rights Act itself was revisited in a comprehensive way. The passage of the Civil Rights Act of 1991 was "the product of protracted interplay between Congress, the executive branch, and the Supreme Court. A spate of Court decisions in the late 1980s drew congressional fire and resulted in demands for legislative change." *Employment Discrimination Law, 3rd Edition, Volume I*, Paul W. Cane, Jr., editor-in-chief, et al., 2, ABA (1996).

Congress found, inter alia, that "additional remedies...are needed to deter unlawful harassment and intentional discrimination in the workplace," and that "legislation is necessary to provide additional protections against unlawful discrimination in employment." 42 USC 1981 sections 2 and 3. Parenthetically, Congress amended section 1977 of 42 USC 1981 at the same time, enormously strengthening that civil rights statute as well.

In the meantime, in the prior year, the Americans with Disabilities Act of 1990, 42 U.S.C. 12101,et seq., had finally been enacted, the latest in a long string of disabilities related legislation beginning with the Social Security Act of 1935 and the LaFollette-Barden Act of 1943. *Disabilities and the Law*, Laura F. Rothstein, Shepherds/McGraw-Hill, Inc., 2-13 (1992). The ADA is undoubtedly "[t]he most significant disability rights statute" on the books. *Id.* at 10. It is an act that affects "millions of employers and their employees." *Discrimination Law and Civil Rights Actions in the Federal Courts,* 2nd edition, Honorable Charles R. Richey, United States District Judge, Thompson West, 6-1 (2003). It is "one of the most important and far-reaching pieces of Congressional legislation of the last decade." *Understanding the Americans with Disabilities Act, An Overview for Lawyers,* William D. Goren, ABA, ix (2000).

Discrimination against the disabled had historically been considered the product of "shameful oversights" causing the handicapped to be "shunted aside, hidden, and ignored." *117 Cong. Rec.* 45974 (1971). But practical considerations also came into play during the final enactment of the ADA. One such reason "was the extreme cost to the federal government of supporting people with disabilities who could be productive members of the work force. In fact, it has been estimated that the inability of people with disabilities

to work costs the United States $111.6 billion every year in medical costs and lost wages. *Understanding the ADA* at 1.

In any case, by 1990 Congress found "that there were 43 million Americans with physical and mental disabilities and that the number [was] increasing." *Disabilities and the Law* at 1. It made the further determination "that discrimination against disabled individuals in employment, public accommodations, telecommunications, transportation, and other areas of public life was...a pervasive problem with no adequate remedy at law....A House of Representatives report concluded that 66 to 75% of disabled individuals, more that 8.2 million persons, were unemployed despite their desire to work. Furthermore, those disabled individuals who were able to find jobs earned 36 to 38% less than their counterparts, and this discrepancy had only worsened during the 1980s." *Disability Law Deskbook, the Americans with Disabilities Act in the Workplace,* Michael Faillace, Practicing Law Institute, 1-4 (June 2003).

2. The Critical Nature of the Circumstances Giving Rise to Anti-Discrimination Legislation Prompted Congress and the Courts to Accord Civil Rights Litigants Unusual Deference and Resulted in Deep-seated Social Change.

Congress and the courts have accorded civil rights litigants unprecedented support. For example, Title VII requires that a case brought under its provisions be assigned "for hearing at the earliest practical date," and that the case be "in every way expedited," a directive giving it priority--everything else being equal--over all other civil actions. 42 U.S.C. 2000e-5(f)(5).

Pro se litigants are permitted to proceed in forma pauperis, and may be assigned counsel without expense to themselves. *See, e.g., Poindexter v. FBI*, 737 F.2d 1173, 1183 (D.C. Cir. 1984) (legislative history of Title VII "clearly indicates that Congress' overriding concerns were the hardship that litigation costs would impose on indigent plaintiffs and the need to minimize the impact of resource imbalances between plaintiffs and defendants on the outcome of Title VII.")

Civil rights plaintiffs on the receiving end of a motion for summary judgement are given greater latitude than is usually given to the non-moving party. Of course, summary judgement is

appropriate only where there is no genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). But this standard "is applied with **added rigor** [against the moving party] in employment discrimination cases, where intent and credibility are crucial issues." *Huff v. UARCO, Inc.*, 122 F.3d 374, 380 (7th Cir. 1997) (emphasis added), *citing Robinson v. PPG Industries, Inc.*, 23 F.3d 1159, 1162 (7th Cir. 1994). It therefore follows that the successful request for summary judgement will come "**sparingly** in employment discrimination cases." *Gudenkauf v. Stauffer Communications, Inc.*, 922 F.Supp. 465, 470 (D.Kan. 1996), *citing Hardin v. Hussmann Corp.*, 45 F.3d 262, 264 (8th Cir. 1995) (emphasis added). And of course, as in any motion for summary judgement, any reasonable inferences that may be drawn from the evidence must be drawn in favor of Plaintiff as the non-moving party. *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1401 (10th Cir. 1988).

These supports are beyond even the deference commonly afforded those protected by a remedial statute, a deference which is also itself necessarily given the civil rights litigant.

The effect of this legislative and jurisprudential treatment of civil rights law upon the public institutions of this country has been profound. Prescinding for the sake of brevity from examining a long list of such institutions, we will look directly at but a few of the effects that civil rights law has had upon the way that business is conducted in America.

Title VII's requirement that information be posted in all places of business covered by the Civil Rights Act in order that all employees be given notice of their rights is indicative of the extent to which the law immediately insinuated itself into the business life of the nation. But far more important is the fact that "equal employment opportunity law led organizations to formalize promotion mechanisms to undermine managerial discrimination." *Equal Opportunity Law and the Construction of Internal Labor Markets*, Frank Dobbin, et al., American Journal of Sociology, Vol. 99 (1993), *in Foundations of Employment Discrimination Law*, 2nd ed., John J. Donohue, Foundation Press, 282 (2003). Dobbin and the other authors of this persuasive article argue that "organizational antidiscrimination policies converged on a set of personnel practices that were isomorphic with the procedurally oriented, quasi-judicial administrative configuration of the federal government—formal,

merit-based, employment and promotion conventions complete with an internal system of grievance adjudication. Once sanctioned by the courts, this approach eclipsed all competing strategies for redressing discrimination." *Id.*

In 1974 the EEOC issued a guidebook, *Affirmative Action and Equal Employment*, which "suggested that employers could avoid litigation by formalizing hiring and promotion procedures and expanding personnel record keeping so that they would be able to prove that they did not discriminate." *Id.* at 284.

Between the mid-60's and the mid-70's, "[p]ersonnel managers sold their bosses on formal evaluation and promotion systems with two arguments: these systems thwarted discrimination and, at the same time, rationalized the allocation of human resources. Their rhetoric coupled the ideas of equity and efficiency." *Id.* at 285. As a result, "[e]xecutives soon recognized that by requiring middle managers to justify hiring and promotion decisions, they could undermine favoritism and ensure that jobs would be filled by the best-qualified applicants." *Id.* So much was this so, that "by 1979, some two-thirds of top corporate executives favored government efforts to increase female and minority participation in the labor force, and a decade later the *Harvard Law Review* argued that managerial support for EEO had become widespread because EEO was seen as a force promoting rational personnel practices." *Id.* at 285-86.

The *Foundations* authors identify some of the mechanisms that evolved from this managerial support--namely, sexual harassment policies, quality circles, open job bidding, and open promotion mechanisms--"as integral to today's organizational representation of the individual." *Id.* at 293. There can be little doubt that a plethora of further such mechanisms have sprung up in the decade since this scholarly publication first evaluated the effects of antidiscrimination law on business. For example, human resources departments, extensive employee training in antidiscrimination policies, and the widespread use of employee manuals to inform workers of their rights are all now commonplace in the business arena.

Given, then, that attorney malfeasance may be used to excuse any garden variety statute of limitations, and given the fact that the extremely high premium placed upon the vindication of civil rights in this country puts that vindication into a virtually unique legal

category, but a category within which attorney malfeasance but infrequently operates in order to permit equitable tolling, Petitioner asks the court to grant an extension of the present law--or that it interpret present law liberally as justice requires--to permit equitable tolling in an instance where it may be shown that attorney malfeasance was the cause of the late filing of an action based upon a claim of discrimination.

3. Summary

Due to the extraordinarily high premium placed by this nation upon the eradication of invidious discriminatory practices, the decision of the district court should be reversed. Society has shown itself willing to pay any fair price to overcome its longstanding mismatch of practice to principle in this area. This is evident in the history, both social and legislative, of the law at issue here, the Americans with Disabilities Act, together with its antecedent anti-discriminatory legislation.

That history shows, first, that society engaged in an unprecedented national "convention" centered on the discriminatory practices that were outlawed as the result of its deliberations.

Second, Congress placed a high premium upon the vindication of the civil rights of its citizens as a matter of public policy when it enacted civil rights legislation in 1964 and on many subsequent occasions.

Third, as a consequence, the courts have shown themselves both deferential and positively supportive of civil rights claims.

Fourth, the public institutions in this country have been radically altered as a result of anti-discrimination laws. This is so especially in employment, since business is not conducted today anywhere in this country without reference to the civil rights of employees.

There is no stronger public policy in this country than the one committed to the eradication of invidious discrimination from the workplace.

B. Civil Rights Claimants are the Driving Force in Upholding and Enforcing that Public Policy

The legal and social transformation effected by

antidiscrimination law, briefly outlined above, is heavily dependent upon individual civil rights litigants, like Mr. Hall, to sustain. Without such litigants acting in the capacity of private attorneys general, the law would fail in its intended effect.

The EEOC itself, originally created as an investigative agency only, was in 1972 armed with the authority to litigate on behalf of the victims of discrimination. The enforcement regulations it adopted specified that they would "be liberally construed to effect the purpose and provisions of title VII and the ADA." 29 C.F.R. 1601.34.

Notwithstanding the power accorded the EEOC, however, studies have shown that its litigation strategy has caused it to play "an essentially passive role in the growth of employment discrimination suits....Rather it makes more sense to think of the Commission as a screening device that has consistently filtered out about 95% of the charges filed with it." *The Changing Nature of Employment Discrimination Litigation*, John J. Donohue III and Peter Siegleman, Stanford Law Review, Vol. 43 (1991), *in Foundations of Employment Discrimination Law* at 258. Consequently, "[t]he efficacy of Title VII and many other federal antidiscrimination laws depends **primarily** on the willingness and ability of workers to bring private suits." *Id.* at 268 (emphasis added).

Quoting Alfred Blumrosen, who wrote in 1971, Donohue and Siegleman explain that "[t]he **crucial innovation** in the 1964 Civil Rights Act was the enlargement of the role of the individual right to sue in the federal courts, rather than the enhancement of administrative agency powers." *Id.* at 269 (emphasis added).

The courts have likewise recognized that the role played by individual litigants is crucial in carrying out Congressionally expressed public policy. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) ("The private right of action remains an **essential means** of obtaining judicial enforcement of Title VII. 42 U.S.C. 2000e-5(f)(1)(1970 ed. Supp. II). In such cases, the private litigant not only redresses his own injury, but also **vindicates the important congressional policy** against discriminatory employment practices." Emphases added.); *citing Hutchins v. United States Industries*, 428 F.2d 303, 310 (5th Cir. 1970), *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 715 (7th Cir. 1969), *Jenkins v. United Gas Corp.*, 400 F.2d 28, 33 (5th Cir. 1968), *Newman v. Piggie Park Enterprises*,

390 U.S. 400, 402 (1968). *See also Morales-Vallellanes v. Potter*, _____, (10th Cir. 2003) (the "legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes"); *Barber v. T. D. Williamson, Inc.*, 254 F. 3d 1223 (10th Cir. 2001) (granting attorney's fees to accompany nominal damages because "**a public goal is accomplished** if the plaintiff's victory encourages attorneys to represent civil rights litigants, affirming an important right, puts the defendant on notice that it needs to improve, and/or provokes a change in the defendant's condition," emphasis added), *citing O'Connor v. Huard*, 117 F. 3d 12,18 (1st Cir. 1997); *Muhammed v. Lockhart*, 104 F.3d 1049, 1070 (8th Cir. 1997); *Piper v. Oliver*, 69 F.3d 875, 877 (8th Cir. 1995); *Wilcox v. Reno*, 42 F.3d 550, 555 (9th Cir. 1994); *Jones v. Lockhart*, 29 F .3d 422,424 (8th Cir. 1994); *Cartwright v. Stamper*, 7 F.3d 106, 109-10 (7th Cir. 1993); *Lucas v. Guyton*, 901 F.Supp. 1047, 1055 (DSC 1995); *see also Barber* at 1235, fn. 4, *citing Sheppard v. Riverview Nursing Ctr., Inc.*, 88 F.3d 1332, 1336 (4th Cir. 1996), *Cabrera v. Jakobovitz*, 24 F.3d 372, 393 (2nd Cir. 1994).

Because the success of the important public policy of eliminating invidious discrimination in the workplace is claimant-driven, the courts should permit the tolling of a deadline missed through attorney misconduct in furtherance of that policy.

C. The Statute of Limitations Should be Tolled in an Instance Like that Presently Before the Court as a Matter of Justice

Statutory time limits may be tolled if such tolling is not inconsistent with the legislative purpose of the statute to which the limits apply. Since it affects a remedial statute, tolling the time limits in the instant case can only be seen as consonant with the statute's purpose. *See, e.g., Jackson v. Continental Cargo*, 183 F.3d 1186 (10th Cir. 1999) ("Title VII is broad remedial legislation that must be liberally construed."), *citing Gonzalez-Aller Balseyro v. GTE Lenkurt*, 702 F.2d 857, 859 (10th Cir. 1983). The Supreme Court gave its imprimatur to this notion when it said that "[b]y holding compliance with the filing period to be not a jurisdictional prerequisite to filing a Title VII suit, but a requirement subject to waiver as well as tolling **when equity so requires**, we honor the remedial purpose of the legislation as a whole without negating the

particular purpose of the filing requirement, to give prompt notice to the employer." *Zipes v. Transworld Airlines,* 455 U.S. 385 (1982) (emphasis added).

Tolling is consonant as well with the enforcement provisions of the Act, relying heavily, as the Act does, on the individual litigant to further its purposes. As the Supreme Court made clear, to permit technicalities to predominate is "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Love v. Pullman,* 404 U.S. 522, 527 (1972).

Because the case at bar deals with a statute of limitations and not of repose, a deadline merely makes a remedy unavailable without disturbing the right attached to it. Since the purposes of the ADA are not undermined by tolling, and since a matter of justice is at stake, if it can be shown that Petitioner was not sleeping on his rights and that there is no undue prejudice to Respondent, the Court should restore to Petitioner the remedy afforded by his still available rights as a matter of fundamental justice. *Zipes*, 455 U.S. at 398; *Gonzalez-Aller* 702 F.2d at 859; *Rowe v. Sullivan*, 967 F.2d 186 (5th Cir. 1992); *Seitzinger v Reading Hospital and Medical Center,* 165 F. 3d 236, 239-42 (3rd Cir. 1999); *Burton v. United States Postal Service,* 612 F.Supp. 1057, 1059 (N.D. Ohio 1985); *Volk v. Multi-Media, Inc.,* 516 F.Supp. 157, 161-2 (S.D. Ohio 1981).

Here, there can be no undue prejudice to the interests of Respondent. First, Respondent has known of Petitioner's ADA claim since the original timely filing of his complaint in this case, if not before. Prompt notice was given, and Respondent has had every opportunity to engage in discovery on this issue and develop its case. Respondent should therefore be well-prepared to engage Petitioner in the courtroom, and cannot show undue prejudice. Second, even if such prejudice can be shown, Respondent has waived the argument since it was not made below.

As to Petitioner's pursuit of his rights, his testimony is that he was in weekly, if not more frequent, contact with his attorney, who continued to offer him reassurances that all was proceeding well for many months. The attorney dismissed Petitioner's case without prejudice, explaining to him that he could refile it within one year in order to excuse himself for having so acted. As soon as Petitioner became aware that his attorney was not performing the work essential to further his interests, Petitioner fired him and diligently sought other counsel. He was unable to procure other counsel in the

short time that remained before the deadline given him by his erstwhile attorney. He therefore decided to refile his lawsuit himself as best he could before the purported deadline.

Plaintiff's diligence is uncontested in the record.

This Court should permit the filing deadline at issue in this case to be extended both to support and help strengthen a critical public policy and to effect justice in the matter at bar.

III. Review by this Court is Warranted Because there is a Split in the Circuits Over the Effect of Attorney Misconduct on the Filing Requirements for Civil Rights Litigants

The Third Circuit has ruled in *Seitzinger*, a case parallel to that at hand, that because the plaintiff in a Title VII action was diligent, but her attorney affirmatively lied to her, there was "a sufficient claim of attorney abandonment to bring the case within a narrow line of cases in which lawyer misconduct justifies equitable tolling." *Seitzinger*, 165 F. 3d at 237-38, *citing Cantrell v. Knoxville Community Dev. Corp.*, 60 F.3d 1177, 1180 (6th Cir. 1995); *Baldwin County Welcome Ctr. v. Brown*, 446 U.S. 147, 151 (1984); *United States v. Midgley*, 142 F.3d 174, 179 (3rd Cir. 1998); *Miller v. New Jersey State Dep't of Corrections*, 145 F.3d 616, 618 (3rd Cir. 1998); *Shendock v. Office of Workers Compensation Programs*, 893 F.2d 1458, 1462 (3rd Cir. 1990); *Burton v. United States Postal Service*, 612 F.Supp. 1057, 1059 (N.D. Ohio 1985); *Volk v. Multi-Media, Inc.*, 516 F.Supp. 157, 161-2 (S.D. Ohio 1981); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990).

The Tenth Circuit has already recognized the principle embodied in the Supreme Court's *Zipes* decision, namely "that a liberal view of Title VII's provisions is a 'guiding principle' of the Act's construction." *Gonzalez-Aller*, 702 F.2d at 859 (concluding as a matter of law that equitable tolling applies where diligent plaintiff was misled). *See also Shipp v. Widnall*, 166 F.3d 348 (10th Cir. 1998, unpublished) (case remanded since "although the district court expressly dismissed [plaintiff's] case without prejudice, at the time it was pronounced, the order was tantamount to a dismissal with prejudice"); *Hiller v. State of Oklahoma*, 327 F.3d 1247 (10th Cir. 2003) (statute will be tolled when "in the interests of justice" plaintiff's rights require vindication because he "has been prevented

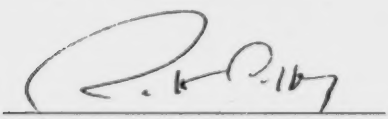
from asserting them"), *citing Burnett v. N.Y. Cont. RR Co.*, 380 U.S. 429 (1965); *Gillilan v. Tennessee Valley Authority,* 91-ERA-31 (Sec'y Aug. 28, 1995) (plaintiff abandoned by attorney, case remanded for consideration of tolling).

Unfortunately, in the instant case the Tenth Circuit ignored its heretofore frequent use of the principles underlying equitable tolling, creating a split in the circuits regarding this urgent matter. The question is therefore ripe for review. This Court should uphold the Third Circuit in its broad provision for the civil rights claimant who seeks redress for invidious discrimination, thereby upholding and vindicating a sensitive and critical public policy.

CONCLUSION

Petitioner prays the Court overturn the Order of the Court below and grant an Equitable tolling of the deadline for the filing of his action until the date upon which it was actually filed, January 21, 2003.

Respectfully submitted,



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PETITIONER'S APPENDIX

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
MAY 25 2004
PATRICK FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JOHN HALL,

Plaintiff-Appellant,

V.

UNITED PARCEL SERVICE, INC.,

Defendant-Appellee.

No. 03-7077
(D.C. No. 03-CV-130-S)
(E.D. Okla.)

ORDER AND JUDGMENT*

Before **KELLY**, Circuit Judge, **BRORBY**, Senior Circuit Judge, and **BRISCOE**, Circuit Judge.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Plaintiff, John Hall, appeals from an order of the district court granting defendant's motion to dismiss this action brought pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12213. We affirm.

Mr. Hall was terminated from his employment with defendant in 1999. He filed a charge of discrimination with the Oklahoma Human Rights Commission and, subsequently, received his right-to-sue letter March 23, 2001. On June 18, 2001, he filed a timely suit in district court with the aid of counsel. Approximately six months later, Mr. Hall, again acting through counsel, filed a motion to dismiss his case without prejudice. The motion was granted and the case was dismissed on January 23, 2002. Almost one year later, Mr. Hall, acting pro se,' filed this suit in district court.

Defendant filed a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Defendant asserted that Mr. Hall's claim was "doubly time-barred" because he had not timely filed his charge with the Oklahoma Human Rights Commission and because he had not timely filed this suit.[2] Aplt. App. at 7. The district court made no finding regarding the timeliness of the filing of the EEOC charge, but concluded the lawsuit was untimely filed. In reaching that conclusion, the district court rejected Mr. Hall's contention that the statute of limitations was tolled following the dismissal of his initial suit.

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[1] Since commencing this action, Mr. Hall obtained counsel who represented him after he filed the complaint and continues to do so on appeal.

[2] Defendant also sought attorney's fees. The district court denied that part of the motion. Defendant does not appeal that determination.

On appeal, Mr. Hall argues that the statute of limitations should be tolled considering the societal reasons underlying the passage of the ADA and related civil rights legislation. He also contends that he was not sleeping on his rights and that attorney misconduct justifies equitable tolling.

"We review *de novo* the district court's dismissal under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted." Ruiz v. McDonnell, 299 F.3d 1173, 1181 (10th Cir. 2002), cert. denied, 538 U.S. 999 (2003). We review "the district court's decision not to apply equitable tolling for an abuse of discretion." Harms v. IRS, 321 F.3d 1001, 1006 (10th Cir.), cert. denied, 124 S. Ct. 159 (2003).

A plaintiff must initiate litigation on an ADA claim within ninety days from the date he receives a "right to sue" letter from the EEOC. See 42 U.S.C. § 2000e-5(f)(1) (providing filing deadlines for Title VII claims); 42

U.S.C. § 12117(a) (specifically adopting Title VII filing deadlines for ADA claims). "These timing requirements are prerequisites to a civil suit." Croy v. Cobe Labs., Inc., 345 F.3d 1199, 1202 (10th Cir. 2003). Mr. Hall agrees that he did not comply with these requirements. However, he contends that these requirements should be tolled in his case because his counsel gave him erroneous advice when counsel told him he could timely refile his action within one year of the date his first case was dismissed.

Generally, "a voluntary dismissal without prejudice leaves the parties as though the action had never been brought." Brown v. Hartshorne Pub. Sch. Dist. No. 1, 926 F.2d 959, 961 (10th Cir. 1991). However, in the absence of a statute to the contrary, the statute of limitations is not tolled during the pendency of the dismissed action. Id. "The requirement that a plaintiff file a timely civil action after the disposition of an individual EEO complaint is not a jurisdictional

requirement, but rather is subject to ... equitable tolling." Harms, 321 F.3d at 1006. The time limit for filing a complaint after receipt of an EEO right-to-sue notice "will be tolled only upon a showing of active deception where, for example, the plaintiff has been actively misled or lulled into inaction *by her past employer, state or federal agencies, or the courts."* Simons v. Southwest Petro-Chem, Inc., 28 F.3d 1029, 1031 (10th Cir. 1994) (emphasis added) (quotations omitted). "[T]he propriety of equitable tolling must necessarily be determined on a case-by-case basis." Johnson v. United States Postal Serv., 861 F.2d 1475, 1481 (10th Cir. 1988) (quotation omitted).

Mr. Hall alleges that he failed to file his second ADA action promptly because he was actively misled by his counsel. We note, however, that Mr. Hall received a right-to-sue letter from the EEOC. This letter contained, in bold print, the warning that he had to file any lawsuit within ninety days of the receipt of the letter, Aplee.

Supp. App. at 102, thus alerting him that timeliness was critical to preserving his claim. Moreover, it was Mr. Hall's own attorney who gave him incorrect information, not his employer, an agency, or the court. "Mere attorney negligence does not justify equitable tolling." Steed v. Head, 219 F.3d 1298, 1300 (11th Cir. 2000); see also Irwin v. Dep't of Veterans Affairs, 498 U.S. 89, 96 (1990) (principles of equitable tolling do not extend to "a garden variety claim of excusable neglect"). The district court did not abuse its discretion in determining that the principles of equitable tolling did not apply here.

The judgment of the district court is AFFIRMED.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

JOHN HALL,)

Plaintiff,)

vs.) CIV-03-130-S

UNITED PARCEL SERVICE, INC.,)

Defendant.)

FILED

JUN 11 2003

WILLIAM B. GUTHRIE
Clerk, U.S. District Court
By: _____
Deputy Clerk

ORDER

Before the court for its consideration is a motion to dismiss for failure to state a claim and motion for attorney fees filed byUnited Parcel Service, Inc. (hereinafter "defendant"). Also before the court is defendant's motion for costspursuant to Federal Rule of Civil Procedure 41 (d). In the motion to dismiss, defendant seeks to dismiss this case because of plaintiff's failure to timely file a charge with the EEOC and because.of plaintiff's failure to timely file a lawsuit after receipt of his right to sue letter. In the portion of the motion that addresses defendant's request for attorney fees, defendant claims they should be reimbursed for having to defend against such a frivolous, unfounded and harassing lawsuit. Defendant contends this second case was only brought for harassment purposes. In a separate motion for costs, defendant seeks costs associated in defending itself in the first case plaintiff filed in this court on June 18, 2001, concerning the same issues.

Plaintiff was terminated from his employment with defendant on September 20, 1999. Plaintiff filed a charge of discrimination with the

Oklahoma Human Rights Commission on July 18, 2000. The EEOC mailed plaintiff a notice of right to sue letter on March 23, 2001. Plaintiff filed his first lawsuit on June 18, 2001. The plaintiff filed a motion to dismiss the case without prejudice and that was granted on January 23, 2002. Plaintiff alleges that his former lawyer John Butler told plaintiff that he had a year from the date of dismissal to file his lawsuit. Plaintiff terminated Mr. Butlerand attempted to find a new lawyer to re-file his lawsuit. He was unable to find a new lawyer to take his case in time for the alleged filing deadline. As a result, he filed his second petition *pro* se on January 21, 2003. He subsequently hired the lawyer who is currently representing him.

In its motion, defendant has argued this case should be dismissed for two reasons. First, plaintiff failed to file his charge of discrimination with the EEOC within three hundred (300) days of the alleged unlawful conduct. Second, a lawsuit must be filed within ninety (90) days of receiving a notice of right to sue in order to be timely. Without making a finding regarding the timeliness of the filing of the EEOC charge, the court still finds this lawsuit is time-barred.

The EEOC mailed to plaintiff his notice of right to sue letter on March 23, 2001. Title VII requires that a plaintiff bring a judicial action within ninety (90) days of receipt of a right to sue letter. See 42 U.S.C. § 2000e- 5(f)(1) (1988) and Williams v. Southern Union Gas Company, 529 F.2d 483, 487 (10th Cir. 1976), cert. denied, 429 U.S. 959 (1976). Plaintiff filed his first lawsuit on June 18, 2001. This lawsuit was clearly filed within the ninety (90) day time-frame. However, this lawsuit was voluntary dismissed without prejudice by plaintiff on January 23, 2002. As the Tenth Circuit Court of Appeals stated in Brown v. Hartshorne Public Schools District, 926 F.2d 959, 961 (10th Cir. 1991)

It is hornbook law that, as a general rule, a voluntary dismissal without prejudice leaves the parties as though the action had never been brought. See, e.g., Robinson v. Willow Glen Academy, 895 F.2d 1168, 1169 (7th Cir.1990); Dutree v. Jefferson, 666 F.2d 606, 611 (D.C.Cir.1981); 5 J. Moore & J. Lucas, Moore's Federal Practice ¶ 41.05[2] at 41-66 to -67 (2d ed.1990); 9 C. Wright & A. Miller, Federal Practice & Procedure § 2367 at 186 (1971). In the absence of a statute to the contrary, the limitation period is not tolled during the pendency of the dismissed action. See Id.; see also Willard v. Wood, 164 U.S. 502, 523, 17 S.Ct. 176, 181, 41 L.Ed. 531 (1896); Stein v. Reynolds Sec., Inc., 667 F.2d 33, 33-34 (11th Cir.1982). Courts have specifically held that the filing of a complaint that is dismissed without prejudice does not toll the statutory filing period of Title VII. See Price v. Digital Equip. Corp., 846 F.2d 1026, 1027 (5th Cir.1988). (per curiam); Wilson v. Grumman Ohio Corp., 815 F.2d 26, 28 (6th Cir.1987) (per curiam). We agree. Id. at 961.

Thus, the statutorily mandated filing period was not tolled after the voluntary dismissal of plaintiff's lawsuit. While plaintiff does not contest that his second lawsuit was filed more than ninety (90) days after the receipt of the right to sue letter and that the time limitation is not tolled after a voluntary dismissal of a lawsuit, he does argue he is entitled to an equitable tolling of the statute of limitations. He argues that while he:

> .. cannot claim the usual ground for his request of the Court that it apply equitable tolling principles, i.e. Defendant's misconduct, he believes that he has other grounds which the Court should consider in the ,interests of justice. Plaintiff

> relied on his attorney to prosecute his case with at least the minimum competence and diligence required of counsel by the Oklahoma Rules of Professional Conduct and the Federal Rules of Civil Procedure. His attorney failed to reach that bareminimum.

Plaintiff argues the negligence of his first lawyer, Mr. John Butler, caused the significant delay in the filing of the second lawsuit. He also argues the dismissal of the first lawsuit was not really voluntary since he was not in agreement with the decision to dismiss the lawsuit. Plaintiff contends he was diligent in pursuing his claims.

In Jarrett v. U.S. Sprint Communications Company, 22 F. 3d 256, 260 (10th Cir. 1994), cert. denied, 513 U.S. 951 (1994) the court stated:

> The ninety-day filing limit is not jurisdictional, but is a requirement that, like a statute of limitation, is subject to waiver, estoppel and equitable tolling. Gonzalez-Aller Balsevro v. GTE Lenkurt, Inc.., 702 F.2d 857, 859 (10th Cir.1983). ...we have taken a strict view of what necessitates equitable tolling. In this circuit, a Title VII time limit will be tolled only if there has been active deception of the claimant regarding procedural requirements. Scheerer v. Rose State College, 950 F.2d 661, 665 (10th Cir.1991), cert. denied, 505 U.S. 1205, 112 S.Ct. 2995, 120 L.Ed.2d 872 (1992).

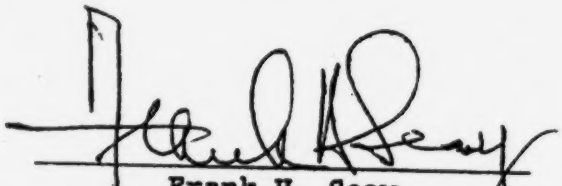
In the case at bar, plaintiff has only been able to come forward with his attorney's conduct as an excuse for his failure to meet the filing deadline. He claims that even though he continued to attempt to make contact with his attorney, his efforts were to no avail. Plaintiff received the notice of right to sue letter and was fully aware of the ninety (90) day timeframe. Afterthe dismissal of the first lawsuit, he alleges his attorney told him he had a year from the date of dismissal in which to bring the lawsuit. Plaintiff alleges he relied upon this representation and did file the

lawsuit one year from the date of the dismissal. Plaintiff's sole excuse for failing to meet the deadline in question is due to the negligence of his first lawyer. It appears to be settled law that "Mere attorney negligence does not justify equitable tolling". Marsh v. Soares, 223 F.3d 1217, 1220-21 (10th Cir. 2000), cert. denied, 531 U.S. 1194 (2001). The conduct which plaintiff believes justifies equitable tolling simply is not the active deception which is required in this circuit to utilize equitable tolling. Accordingly, the court finds the facts of this case simply do not warrant equitable tolling.

The facts are undisputed, plaintiff filed his lawsuit almost six hundred (600) days after receiving his right to sue letter. The court fails to find circumstances justifying equitable tolling. As a result, this lawsuit is time-barred. This court simply lacks jurisdiction to-hearplaintiff's claims. Accordingly, this lawsuit must be dismissed.

Further, the court denies the defendant's request for attorney fees associated with this action. It further denies the request for costs associated with the first case.

IT IS SO ORDERED this 11th day of June, 2003.



Frank H. Seay
United States District Judge